STATE OF MICHIGAN

COURT OF APPEALS

RIVER CITY CONSTRUCTION, INC.,

Plaintiff-Appellee/Cross-Appellant,

v

ABC PAVING COMPANY,

Defendant-Third Party
Plaintiff/Cross Plaintiff'
Appellant/Cross-Appellee,

v

COMMERCE CHARTER TOWNSHIP,

Third-Party Defendant
Cross Defendant-Appellee.

UNPUBLISHED
March 15, 2005

No. 250721
Oakland Circuit Court
LC No. 2001-034304-CK

Before: Wilder, P.J., and Fitzgerald and Kelly, JJ.

PER CURIAM.

Defendant ABC Paving Company appeals as of right the "Order Dismissing Certain Claims and for Judgment in Favor of Plaintiff" that awarded plaintiff, River City Construction, Inc., $99,820.16 in damages and dismissed third-party defendant Commerce Charter Township from liability in this breach of contract action. River City cross-appeals the dismissal of additional claims against ABC. We affirm.

Commerce Township contracted with ABC to install water pipes to allow the township to extend water to one of its subdivisions. The contract required ABC to install water pipes in two different manners. One manner involved the digging of trenches and one manner involved underground horizontal directional drilling. ABC decided to perform the trench method itself and to subcontract out the underground directional drilling to River City. River City's bid, which was accepted by ABC, set forth the price of $134 per foot, but specifically stated:

> The above price is based on drilling in soils. This price does not include drilling in cobble, rock, gravel, boulders, landfill materials, or fissures. If such conditions exist, River City Construction, Inc., reserves the right to renegotiate an adjustment or cease operations.

Shortly after River City began drilling it encountered rock. After leaving the site, River City sent a letter to ABC with a new price quote of $264.50 per foot to drill through the rock. ABC responded in a letter that "We have transmitted the extra drilling claim to Commerce Township, we do not see any problems occurring with the pricing. Please let me know if February 26th is still confirmed to be back on site for drilling to continue." River City completed the project. Unbeknownst to River City, ABC's project manager, Jeff Sendelbach, calculated an amount that he thought would be sufficient to cover the costs of drilling through rock. He then notified Commerce Township that River City had encountered rock and that ABC needed an additional $152,265 to cover the extra costs. Commerce Township countered with $13,803.12, and ABC accepted. ABC never told River City that Commerce Township had only agreed to pay $13,803.12 to cover the additional costs of drilling through rock. ABC never paid River City for its additional costs of drilling through the rock. River City filed this action, alleging that ABC was liable for breach of contract, as well as for additional costs resulting from soil borings authorized by the township that interfered with its drilling.

After a bench trial, the trial court ruled that ABC was liable to River City for additional costs incurred as a result of drilling through underground rock, but that Commerce Township was not liable to ABC for those costs. ABC now argues that the trial court's ruling was inconsistent because ABC was merely the middleman between River City and Commerce Township. ABC essentially argues that it should not have to pay for the extra expenses incurred by River City as a result of drilling through the underground rock. In the alternative, ABC argues that the township should have to reimburse ABC for any damages awarded to River City.

This Court reviews for clear error the trial court's findings of fact, and reviews de novo the trial court's findings of law. *Gumma v D&T Constr Co*, 235 Mich App 210, 221; 597 NW2d 207 (1999). The trial court's findings of fact are clearly erroneous if this Court, after reviewing the entire record, is left with the definite and firm conviction that a mistake has been committed. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). A contract that is clear and unambiguous is construed as a matter of law. *Port Huron Ed Ass'n MEA/NEA v Port Huron Area School Dist*, 452 Mich 309, 323; 550 NW2d 228 (1996).

The trial court properly concluded that ABC's conduct constituted acceptance of River City's bid of $264 per foot. An acceptance of an offer to contract may be implied from acts and circumstances of the parties. *Ludowici-Celadon Co v McKinley*, 307 Mich 149, 153; 11 NW2d 839 (1943). Acceptance may be implied from the party's conduct when the offer does not require a specific form of acceptance. *Patrick v US Tangible Investment Corp*, 234 Mich App 541, 549; 595 NW2d 162 (1999). Here, Sendelbach sent a fax to River City on February 20, 2001, stating that ABC did not see any problems occurring with the pricing and inquiring whether drilling would continue. In a February 20 letter to Sendelbach, River City's president, Mark Bazen, talked about returning to work and continuing to drill. Sendelbach responded, "That will be fine. We will see you then." On March 1, Sendelbach sent River City a letter

confirming that "the drilling will begin on Monday, March 5, 2001." Sendelbach's actions imply an acceptance of River City's higher price.[1]

Even without an express or implied acceptance of River City's higher price, the trial court correctly concluded that ABC is bound by the doctrine of promissory estoppel. The doctrine of promissory estoppel requires (1) a promise; (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promissee; (3) which in fact produced reliance or forbearance of that nature; (4) in circumstances such that the promise must be enforced if injustice is to be avoided. *Joerger v Gordon Food Service, Inc,* 224 Mich App 167, 173; 568 NW2d 365 (1997). Sendelbach should have reasonably expected that River City would restart working when he told Bazen that he saw no problems with the higher price. Bazen testified that River City would not have continued to drill had he known River City would not be paid the higher price. Given these facts, the trial court properly concluded that an injustice would occur if ABC did not reimburse River City for extra expenses incurred as a result of ABC's encouragement.

ABC maintains that if it is liable to River City for the additional costs, that it in turn is entitled to reimbursement from Commerce Township. The trial court held that ABC entered into two separate agreements – one with Commerce Township and one with River City. The trial court then determined that Commerce Township was not liable to River City because of ABC's failure to timely notify Commerce Township of the underground rock, as required by their contract, and its acceptance of Commerce Township's offer of $13,803.12 to cover the additional costs incurred due to rock.

The contract between ABC and Commerce Township clearly states that the contractor must stop work and notify Commerce Township promptly, in writing, if the contractor believes differing subsoil conditions, such as rock, exist. The contract also states that the contractor is not to perform any work or disturb conditions unless it receives a written order to do so. The inspection reports presented at trial establish that ABC did not comply with these requirements. Instead, ABC allowed River City to continue drilling for nine days after learning of the underground rock. The contract also bars the contractor from receiving any adjustment for noncompliance with the notice provisions. Commerce Township presented evidence that it paid ABC $13,803.12 for the expenses incurred from hitting rock, and that ABC agreed to and accepted the payment. Thus, contrary to ABC's contention, the trial court's rulings regarding ABC's obligations pursuant to two different agreements are not inconsistent.

On cross-appeal, River City argues that the trial court erred by failing to award damages for the additional costs incurred as a result of electrical interference and a bentonite leak. Defendant's reliance on *John E Green Plumbing and Heating Co, Inc v Turner Construction Co,* 742 F2d 965, 967 (CA 6 1984), in support of its argument that it should be compensated for additional costs that were not anticipated in the parties' agreement is misplaced. In that case, a subcontractor was allowed to recover damages from a contractor who intentionally interfered

[1] Sendelbach confirmed that he never informed River City that Commerce Township agreed only to pay $13,803.12 to cover the additional costs of drilling through the rock.

with its work by such acts as turning off the heat and ordering work done out of sequence. *Id*. Here, River City presented no evidence that ABC intentionally interfered with its drilling, or even knew Commerce Township's engineers were conducting the soil borings. A party may not leave it to this Court to search for authority to sustain or reject its position. *In re Keifer*, 159 Mich App 288, 294; 406 NW2d 217 (1987).

Finally, ABC argues that it is entitled to a new trial because transcripts for the final two days of the four-day bench trial are missing. To substitute for the missing two days of trial transcript, the trial court certified a settled trial record as the official trial record for those two days. ABC failed to identify how the settled trial record is inaccurate and how any inaccuracy would adversely affect this Court's ability to review the issues before it. Thus, we cannot conclude that the trial court abused its discretion by denying ABC's motion for a new trial. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003).

Affirmed.

/s/ Kurtis T. Wilder
/s/ E. Thomas Fitzgerald
/s/ Kirsten Frank Kelly